IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-734

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

vs.

DIVISION 1287, AMALGAMATED TRANSIT UNION, AFL-CIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LINDA R. HIRSHMAN
JACOBS, BURNS, SUGARMAN & ORLOVE
201 North Wells Street, Suite 1900
Chicago, Illinois 60606
Telephone: 312/372-1646
Attorney for Respondent

EARLE PUTNAM, Esq.
General Counsel
Amalgamated Transit Union
5025 Wisconsin Avenue, N. W.
Washington, D. C. 20016

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565 58

TABLE OF CONTENTS

Table of Authorities

Cases

Federal Statutes

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-734

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

vs.

DIVISION 1287, AMALGAMATED TRANSIT UNION, AFL-CIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATUTES INVOLVED

It shall be a condition of any assistance under this chapter that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the

protection of individual employees against a worsening of their positions with respect to employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements. 49 U. S. C. § 1609(c).

QUESTIONS PRESENTED

Whether the Court of Appeals erred in holding that Plaintiff's claim to enforce § 13(c) of the Urban Mass Transportation Act of 1964, 49 U. S. C. § 1601 *et seq.*, mandating protective arrangements as determined by the Secretary of Labor for employees of recipients of federal funds, arose under federal law as required by 28 U. S. C. § 1331.

Whether the Court of Appeals erred in affirming the District Court's finding that the agreements concluded by Defendant Kansas City Area Transportation Authority ("KCATA") determined by the Secretary to fulfill the mandate of § 13(c), included the obligation to arbitrate the terms of a new collective bargaining agreement, at the instance of either party.

Whether the Court of Appeals erred in rejecting KCATA's contention that general municipal law doctrines of some states render retroactively invalid its agreements of ten years standing, concluded in fulfillment of the federal statutory requisites for the receipt of millions of federal dollars.

STATEMENT OF THE CASE

Petitioner, KCATA, requests this Court to review the ruling of the United States Court of Appeals for the Eighth Circuit enforcing § 13(c) of the Urban Mass Transportation Act, 49 U. S. C. § 1609(c). The Act provides that grant recipients shall make arrangements to protect the interests of employees affected by the assistance.

In 1968, just after KCATA was created, it applied for and received a large federal grant to commence operations (A. 7-8). As set forth in the federal Act, to qualify for the federal money, KCATA and the Union concluded a § 13(c) Agreement setting forth the specifics of the requisite fair and equitable arrangement; the arrangements were also specified in the grant contract with the United States (A. 11-13). The § 13(c) Agreement provided for arbitration of the terms and conditions of a new collective bargaining agreement, in the event collective bargaining resulted in an impasse ("interest arbitration") (A. 11-12). The Secretary of Labor determined that the statutory requirements were fulfilled by the terms of the § 13(c) Agreement submitted by KCATA, and KCATA received its federal funds (A. 11-13). Thereafter, each time KCATA sought more funds under the UMT Act, the parties concluded successive Agreements, embodying the same provision (A. 13-15). In the last ten years, since KCATA began operations after its first UMTA grant, the parties referred their collective bargaining agreements to interest arbitration twice (A. 15).

This case arose when, for the first time since 1968, KCATA refused to arbitrate after impasse (A. 16). The District Court ruled that it had jurisdiction to consider Plaintiff's claim for enforcement of § 13(c); after two days of hearing, the Court held that the § 13(c) Agreements, determined by the Secretary to fulfill the statutory needs, mandated arbitration in this instance and rejected KCATA's defense that arbitration was beyond its authority (A. 18-24).

The District Court entered a permanent injunction ordering KCATA to arbitrate this dispute, and the Court of Appeals for the Eighth Circuit affirmed (A. 25). After an examination of the role of the § 13(c) Agreements in carrying out the federal statutory scheme, the Court concluded that the action arose under federal law, under the standards set forth by this Court in *Bell* v. *Hood*, 327 U. S. 678 (1946). On the merits, the Court also affirmed the District Court ruling that the contracts mandated arbitration, in light of the documents themselves, the history of the negotiations that produced them and the subsequent conduct of the parties. Finally, the Court rejected KCATA's contention that doctrines of state law compelled it to repudiate its commitments, noting that the case involved the "vital" interests of labor peace in urban mass transit and the special case of a bistate transit agency established for purposes of receiving federal UMTA money (A. 40). In so ruling, the Eighth Circuit was but the first of three Courts of Appeals ruling in favor of the position of respondent here this year. *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, No. 77-1981 (7th Cir. 10/19/78);[1] *Local 714* v. *Portland*, No. 78-1077 (1st Cir. 11/15/78).[2]

1. A copy of the as yet unpublished opinion of the Court of Appeals for the Seventh Circuit in *Local 519* is reproduced herein as Respondent's Appendix, p. A1.

2. A copy of the as yet unpublished opinion of the Court of Appeals for the First Circuit in *Local 714* is reproduced herein as Respondent's Appendix, p. 21.

ARGUMENT

The Petitioner has not presented this Court with any reason to exercise its discretionary writ to review this case. There is no conflict in the Circuits; indeed, three circuits have affirmatively ruled in support of Respondent here. There is no conflict with any settled decisions of this Court; this Court has already ruled several times in favor of Respondent's position here regarding federal subject matter jurisdiction. On the merits, the decision below is well-founded in the facts of this case and the law of the states involved, as this Court has repeatedly ruled, a subject uniquely suited to resolution by the local federal courts.

I. The Courts of Appeals Are Unanimous in Resolving the Issues Here in Favor of Respondent.

As set forth above, this is one of several cases involving § 13(c) of the UMTA, decided this year. *Local 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, 582 F. 2d 444 (8th Cir. 1978); *Local 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility, supra; Local 714* v. *Portland, supra; Local 1285* v. *Jackson Transit Authority*, No. 78-1185 (*appeal pend'g.*, 6th Circuit).

In the three appellate opinions, the Courts of Appeals all recognized that Plaintiffs were seeking to enforce a federal statute establishing conditions on federal funding through the vehicle of agreements determined by the Secretary of Labor in each case to carry out the mandate of the Act.

Accordingly, without even a dissenting opinion, the three Courts of Appeals held that, for purposes of federal subject matter jurisdiction, these actions to enforce the conditions on federal spending "arose under" the federal statute creating the conditions and were properly enforced by representatives of the benefited classes. As the Courts recognized, to have held otherwise would have produced the anomalous result that a federal statute, not committed to public inforcement as part of a federal regulatory scheme, could not be enforced in the federal courts. In the words of two of the Appeals Courts sustaining the enforceability of the federal Act, "Congress intended that the contracts embodying the 'fair and equitable arrangements' were to be enforceable contracts. It would be fatuous to suggest otherwise." 582 F. 2d, at 453, and *Local 519, supra,* (Resp. App., p. A17).

In the fourteen years since passage, the published precedent reflects almost no other such actions, state or federal.[3] As the opinions indicate, the short burst of controversy over § 13(c) reflected the bench ruling of Judge Port in 1977 in *Division 580* v. *CENTRO,* No. 77-CV-45 (N. D. N. Y. 1977), that the federal courts lacked subject matter jurisdiction to consider an action to enforce § 13(c).[4] While the appeal from Judge Port's

3. Amicus APTA suggests that the decision here would generate a wave of litigation and flood the federal courts. (Am. Cur., p. 32). To the contrary, although all parties acknowledge that § 13(c) Agreements have been common in the industry for at lease ten years and could have been enforced, at least in state courts, at any time, there are almost no such reported decisions. Until this year, the Agreements, operating in the context of settled collective bargaining relationships, were the source of little controversy. For example, here, in the Kansas City case, the parties arbitrated two collective bargaining agreements during the ten years since the first § 13(c) Agreement, without any talk of litigation. (A. 15).

4. *Division 580* went to the courts initially, because of a waiver issue not present in any of the other cases. The District Judge and the Court of Appeals exercised federal jurisdiction to decide the waiver issue on a motion for preliminary injunction. Thereafter, on remand, Judge Port dismissed for want of jurisdiction. See Op. of Judge MacMahon in *Division 580, supra* (No. 77-CV-45, 2/9/77),

(Footnote continued on next page)

ruling was pending, the parties concluded a collective bargaining agreement, and the opinion was vacated as moot. Thereafter all the other Courts of Appeals ruled for Respondents on every issue.

II The Eighth Circuit Decision Is Consistent with the Rulings of This Court.

As set forth above, § 13(c), in a form typical of federal spending legislation, imposes a number of conditions on the receipt of federal funds. One condition is that a recipient of federal UMTA money must make fair and equitable arrangements for the protection of the interests of its employees. The statute mandates minimum conditions and leaves it to the sound discretion of the Secretary of Labor to determine what remaining fair and equitable arrangements are required by the Act in each specific instance.[5]

(Footnote continued from preceding page.)

aff'd, 556 F. 2d 659 (2nd Cir. 1977). In the two cases dismissing for want of federal jurisdiction, both Judges relied heavily on a transcript of Judge Port's ruling. The Opinion in *Division 714* has now been reversed, and *Local 1285, ATU* v. *Jackson, supra,* is pending on appeal.

To create an appearance of divided lower Court opinion, Amicus and KCATA are reduced to relying on two unpublished decisions, remanding after removal actions to enforce § 13(c) Agreements. *Metropolitan Atlanta Rapid Transit Authority* v. *Division 732, Amalgamated Transit Union,* No. 14892 (N. D. Ga., 7/1/73); *Transit Authority of Louisville and Jefferson County* v. *Amalgamated Transit Union,* No. 76-0535-1(B) (W. D. Ky. 7/20/77). These cases are of little weight, since, in each case, the federal court was construing the transit authority's complaint alleging a violation of contract to determine the propriety of removal. Where the facts can support both a state and a federal claim, the Courts on removal treat Plaintiff as master of his own claim and defer to his judgment regarding forum. *LaChemise LaCoste* v. *Alligator Co.,* 506 F. 2d 339 (3rd Cir. 1974), *cert. den.,* 421 U. S. 937; *Jones* v. *General Tire & Rubber Co.,* 541 F. 2d 660 (7th Cir. 1976). Of course, remand cannot be appealed. 28 U. S. C. § 1447(d).

5. Contrary to the representation of amicus, the statute does not speak of "harm" to employee interests; merely "affect." (Am. Cur.,

(Footnote continued on next page)

In sustaining federal subject matter jurisdiction in these cases, the Courts of Appeals properly relied on this Court's decision in *International Association of Machinists* v. *Central Air Lines, Inc.*, 372 U. S. 682 (1963).[6] In *Machinists*, this Court ruled that a federal statute that mandates the making of an arrangement also mandates its enforcement and/or construction by a federal court.[7]

In language particularly appropriate to this case, this Court outlined how the action arose under federal law:

> It is therefore the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes.

(Footnote continued from preceding page.)

pp. 19, 21, 22). The legislative history of § 13(c) shows that Congress was quite aware that federal money could have an "effect" without necessarily doing immediate "harm." Congress was particularly alert to the effect on employee rights of the conversion of private transit to public—the situation here. Sen. Hearings on S. 6 before the Subcommittee on Housing of the Sen. Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963), ("hereafter Sen. Hearings"), at 314, 325, and Hearings on H. R. 3881 before House Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963), at 563.

6. The Courts routinely applied the standard of *Bell* v. *Hood, supra*, and determined the Plaintiff's claim was not frivolous, insubstantial or made for purposes of federal jurisdiction. The *Bell* standard was just reiterated by this Court in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 98 S. Ct. 2620 (1978).

7. In direct conflict with the holding and language of *Machinists* Amicus Curiae proposes that:

> In this case, the necessary labor protections mandated by the statute are in place, the protections are quite incidental to the statutory purpose and program, and there is no federal interest in policing the arrangements. (Am. Cur., p. 19).

In *Machinists*, this Court reversed the ruling of the Court of Appeals for the Fifth Circuit that a statute mandating an Agreement is satisfied the moment the arrangements are concluded, leaving the federal statutory scheme to any state contract law that happened to apply. Compare, *Machinists, supra*, with *Machinists*, 295 F. 2d 209, at 211, 215-16 (5th Cir. 1961).

> It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provisions contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. *Id.*

Since *Machinists*, the Courts have repeatedly ruled, in reliance on *Machinists*, that an action to enforce an agreement mandated by federal law arises under federal law. *Florida East Coast Railroad* v. *Jacksonville Terminal*, 328 F. 2d 720 (5th Cir.) *cert. denied*, 374 U. S. 830 (1964); *Brotherhood of Railway, etc.* v. *Special Board of Adjustment*, 410 F. 2d 520 (7th Cir. 1969), overruled on other grounds, *Merchants Despatch Transportation Company* v. *Systems Federation, etc.*, 551 F. 2d 144 (7th Cir. 1977) (reaffirming principle at issue here).

As two of the appeals courts noted, the results here are also substantially supported by this Court's decision exercising jurisdiction in *Norfolk and Western Railway Company* v. *Nemitz*, 404 U. S. 37 (1971), to enforce the specifics of an employee protective arrangement the making of which was mandated by § 5(2)(f) of the Interstate Commerce Act.[8]

The Interstate Commerce Act contains several provisions for arrangements similar to § 5(2)(f) and U. M. T. A. § 13(c), and the Courts of Appeals have also repeatedly exercised federal jurisdiction under 28 U. S. C. § 1331 and 28 U. S. C. § 1337 at the instance of the persons protected. *Brotherhood of Locomotive Engineers* v. *Chicago & Northwestern Rwy.*, 314 F. 2d 424 (8th Cir. 1963), *cert. denied, Burlington Northern, Inc.* v. *American Railway Supervisors Association*, 503 F. 2d 58 (7th Cir. 1974), *cert. denied*, U. S. 975 (1975); *Florida East Coast Railway, supra.*

8. Congress, in considering § 13(c), made repeated reference to the provisions of § 5(2)(f). See, esp., Sen. Hearings, at 330-331.

Both before and after § 13(c), Congress, pursuant to the spending power, passed a host of similar statutes imposing various conditions on the receipt of federal funds.[9] See, for example, the Davis-Bacon Act, 40 U. S. C. § 276a and the Housing Act, 42 U. S. C. § 1455(c). Under each of these statutes, as in § 13(c), the grant recipient must both make arrangements for the benefited group and sign a written contract including such arrangements with the United States.[10]

In numerous cases in several circuits, the federal courts have exercised jurisdiction to enforce these statutory conditions against the grant recipients at the instance of representatives of the benefited class. In each case, the Court either explicitly found or routinely exercised federal jurisdiction. Explicitly or implicitly, each decision holds that the individual Plaintiff had standing to sue and the implied private federal right to enforce the arrangement against the recipient. *Norwalk CORE* v. *Norwalk Redevelopment Authority*, 395 F. 2d 920 (2nd Cir. 1965); *Bradford School Bus Transit* v. *CTA*, 537 F. 2d 943 (7th Cir. 1976), *cert. denied*, 429 U. S. 1066, 1977; *Garrett* v. *City of Hamtramck*, 503 F. 2d 1236 (6th Cir. 1974); *M. M. Crockin Co.* v. *Portsmouth Redevelopment & Housing Authority*, 437 F. 2d 784 (4th Cir. 1971); *Fletcher* v. *Housing Authority of Louisville*, 491 F. 2d 793 (6th Cir. 1974); *vac. on other grds.*, 419 U. S. 812, *aff'd on rem.*, 525 F. 2d 532; *McDaniel* v.

9. During the debates on § 13(c), Congress was explicitly referred to President Kennedy's Executive Order imposing federal conditions on recipients of federal housing money, and the legislative history and language are unmistakable. Sen. Hearings, at pp. 326, 640. Section 13(c) is but one of several federal conditions for receipt of UMTA money. For example, see 49 U. S. C. § 1602(g), prohibiting grant recipients from competing with private school bus companies.

10. In essence, these laws embody the principles set forth in *King* v. *Smith*, 392 U. S. 309, 332, n.34:

> There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, . . .

University of Chicago, 512 F. 2d 583 (7th Cir. 1975); *vacated*, 423 U. S. 810, *reaff'd. on rem.*, 548 F. 2d 689 (7th Cir. 1977); *cert. denied*, 98 S. Ct. 765 (1978); *Euresti* v. *Stenner*, 458 F. 2d 1115 (10th Cir. 1972); *Bossier* v. *Lemon*, 370 F. 2d 847 (5th Cir. 1967), *cert. denied*, 388 U. S. 911 (1967).

Properly viewed as one of many conditions on federal money, enacted routinely under the spending power, § 13(c) falls easily into place, and it is not surprising that the cases decided this year provide unbroken authority for its enforcement.

The Courts of Appeals for the First and Seventh Circuits have also properly refused to squeeze this case into the framework of *Cort* v. *Ash*, 422 U. S. 66 (1975), for implication of a private damage remedy under a federal regulatory scheme.[11] In the case at hand, the Court of Appeals for the Eighth Circuit was actually not presented with the contention that § 13(c) is not to be privately enforced. Appellant KCATA did not appeal from the District Court ruling on that issue, and its Briefs to the Court of Appeals did not address the issue nor cite to *Cort* v. *Ash*. Accordingly, under well settled principles, this Court should not review the matter here. *F. C. C.* v. *National Citizen's Committee for Broadcasting*, 98 S. Ct. 2096, 2118; *Wise* v. *Lipscomb*, 98 S. Ct. 2493 (1978).

Should this Court decide to consider the question, KCATA's description of the issue in its Petition for Certiorari amply illustrates the error of trying to impose *Cort* here. *KCATA* contends ". . . the Union has chosen the wrong Court, under the principles of *Cort* v. *Ash*." (Pet. for Cert., p. 10). *Cort* is not a standard for determining whether a private action belongs in federal Court or state Court. *Cort* decided whether to imply, beyond a federal public regulatory remedy, an additional federal private judicial

11. Since this is an action for injunctive relief enforcing a non-regulatory Act, neither category actually applies. *Piper* v. *Chris-Craft Industries*, 430 U. S. 1 (1977), at 47, n.33. The Court of Appeals for the First Circuit applied an independent analysis to conclude that § 13(c) should be privately enforced and found its conclusion "entirely consistent" with *Cort* v. *Ash*. (Resp. App., p. A43).

remedy. By framing the question as whether to imply a private federal remedy, Petitioner conceals that, under its scheme, the federal statute protecting employees would not be federally enforceable at all. Amicus actually acknowledges this extraordinary result:

> The Congress was willing to require that the Act protect employees from harm arising as a result of the project, but not to go any further. (Am. Cur., p. 28).

As two Courts of Appeals have ruled,[12] the contention that Congress created rights it intended not to be enforced is fatuous.[13]

III. This Court Should Not Review the Eighth Circuit's Rulings on the Merits of This Case.

After ten years of concluding § 13(c) Agreements and receiving the accompanying funds, and after twice proceeding to arbitration as at issue here, KCATA tried to convince the courts that no such obligation existed.[14]

12. The Eighth Circuit, although not presented with the contention that this action must meet the standards of *Cort* v. *Ash*, noted, in affirming the decree, that, of course, the arrangements were enforceable. (A. 40).

13. Insofar as *Cort* would apply, the legislative history readily reveals that, in § 13(c), Congress committed itself "especially" and explicitly to protecting the employees represented here. See, esp., S. Rep. No. 82, 88th Cong., 1st Sess. (1963). The protections of § 13(c), along with many other protections for interests that would feel the impact of massive federal transit funding, form a coherent legislative scheme for controlled social development. The references to two other legislative schemes, the Housing laws and the Interstate Commerce Act, both privately enforced, indicate the Congressional intent, and Congress clearly manifested its intent to preserve the benefits of federally protected collective bargaining relationships, a matter of traditional federal concern. 109 Cong. Rec. 5675. See, also, *Local Division 714* (Resp. App., pp. A45-49).

14. The Brief of Amicus APTA clearly sets forth that the transit authorities determined not to challenge the requirements imposed under UMTA directly, at the time of funding, but rather to make any representations they felt necessary to obtain the federal funds (Am. Cur., pp. 2-4). A direct challenge to the Secretary of Labor

(Footnote continued on next page)

As a matter of interpretation of the Agreements, the District Court concluded that the obligation to arbitrate is unambiguously provided in the documents and supported by the history of the negotiations. (A. 19).[15] The Court of Appeals similarly ruled based on the documents and negotiating history (A. 39). Thus, neither Court's opinion of what was provided in the Agreements rested for its holding, as Petitioner suggests, on the need for an expansive construction of arbitration obligations.[16]

The Court also properly rejected the contention that a bi-state agency, created by an Act of Congress to be the recipient of federal funds, could retroactively repudiate ten years of commitments to the federal government in satisfaction of a federal spending law on grounds of an amorphous "general" anti-

(Footnote continued from preceding page.)

is very difficult, since, under existing precedent, the Secretary of Labor has broad discretion in demanding adequate arrangements. *Kendler* v. *Wirtz*, 388 F. 2d 381 (3rd Cir. 1968). By signing the Agreements, taking the money and then contending the Agreements are invalid, the transit authorities actually seek to obtain retroactive indirect review of the Secretary's discretion in demanding particular arrangements—review foreclosed to them under the statutory scheme.

15. The Court had before it undisputed evidence of all of the drafts exchanged and written comments made by each party before conclusion of the Agreement and testimony about the one face to face negotiation, culminating in the testimony of the only KCATA witness to the events that he knew the Union thought it had achieved an Agreement providing mandatory arbitration in this circumstance. (R. 51).

16. The KCATA's authorities, holding that interest arbitration does not constitute a mandatory subject for bargaining under the N. L. R. A., 29 U. S. C. § 151 *et seq.*, are simply inapposite to the considerations in these cases, enforcing long-standing arrangements under the mandate of § 13(c). As those cases hold, to qualify as a mandatory subject under N. L. R. A., the matter must bear directly on the substantive terms and conditions of employment of the employees involved. The NLRA itself set up the structure by which the process of bargaining takes place. By contrast, as the language and legislative history of § 13(c) reveal, § 13(c) arrangements are intended to establish the structure and framework of the collective bargaining relationship. The collective bargaining structure established then produces the substantive terms of employment.

arbitration "policy." (A. 14). Among other good reasons, the Court noted that arbitration as a substitute to replace economic warfare in the vital area of urban mass transit was well grounded in public policy (A. 40).[17]

The Courts below also properly rejected KCATA's invitation to create a conflict with the UMTA by stretching examples of some states' common law regarding the limited police power of municipalities to determine the authority of a bi-state transit agency to contract for federal transit funds. The District Court decision, affirmed by the Court of Appeals, that Missouri and Kansas common law do not deprive KCATA of the requisite authority, is an application of local law not normally reviewed by this Court. *Runyon* v. *McGrary*, 427 U. S. 181, 185 (1976), citing *Bishop* v. *Wood*, 426 U. S. 341, 346 (1976).

Moreover, just recently, in dealing with another bi-state agency's authority to make restrictive contracts with private parties, this Court explicitly noted that the bi-state agency's power to so contract had been confirmed. *United States Trust Co.* v. *New Jersey*, 97 S. Ct. 1505 (1977), citing *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority*, 12 N. Y. 2d 379, 190 N. E. 2d 402, *appeal dism.*, 375 U. S. 78 (1963); *Kheel* v. *Port of New York Authority*, 331 F. Supp. 118 (S. D. N. Y. 1971), *aff'd.*, 457 F. 2d 46 (2nd Cir.) *cert. denied*, 409 U. S. 983 (1972). Thus, KCATA's decisions purporting to limit the authority of subordinate units of municipal government can-

17. It has long been established Transit Union policy to pursue arbitration in this area of public service as an alternative to strikes even against private transit companies. The Constitution and General Laws of the Amalgamated Transit Union provides that no union may strike unless and until it has offered to the employer and the employer has rejected final and binding arbitration of any unsettled dispute. [See, Constitution and General Laws of the Amalgamated Transit Union, § 27.2]. From 1943 to 1968, the collective bargaining agreements between the private predecessor to KCATA and the Union provided for such arbitration (R. 59, 62, Court's Exh. 1).

not dictate the outcome here. As this Court ruled in *Petty* v. *Missouri Bridge Commission*, 359 U. S. 275, 278-279 (1959):

> The construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3, of the Constitution presents a federal question. . . . Moreover, the meaning of a compact is a question on which this Court has the final say. . . . In making that interpretation we must treat the compact as a living interstate agreement which performs high functions in our federalism, including the operation of vast interstate enterprises.

CONCLUSION

In sum, the transit authorities' efforts to escape the obligations incurred in exchange for millions of federal dollars has been rejected by the unanimous opinions of three Appeals Courts. Those unanimous decisions, well founded in the authority of this Court, and, in this case, in the particular facts involved, should not be further reviewed.

Respectfully submitted,

LINDA R. HIRSHMAN
JACOBS, BURNS, SUGARMAN & ORLOVE
201 North Wells Street, Suite 1900
Chicago, Illinois 60606
Telephone: 312/372-1646
Attorney for Respondent

EARLE PUTNAM, Esq.
General Counsel
Amalgamated Transit Union
5025 Wisconsin Avenue, N. W.
Washington, D. C. 20016

Respondent's Appendix

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 77-1981

LOCAL DIVISION 519, AMALGAMATED TRANSIT UNION, AFL-CIO,

Plaintiff-Appellee,

vs.

LACROSSE MUNICIPAL TRANSIT UTILITY AND CITY OF LACROSSE, WISCONSIN,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 77 C 292—James E. Doyle, Judge.

ARGUED APRIL 24, 1978—DECIDED OCTOBER 19, 1978

Before SWYGERT and CUMMINGS, *Circuit Judges*, and MARKEY, *Chief Judge*.[1]

SWYGERT, *Circuit Judge*. Defendants-appellants appeal from an order granting a preliminary injunction enforcing a binding arbitration clause in a collective bargaining agreement made pursuant to the provisions of 49 U. S. C. §§ 1601 *et seq*. The questions on appeal are: (1) whether the district court had jurisdiction over this action; (2) whether, if federal jurisdiction exists, the district court should have abstained from exercis-

1. The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

ing it; and (3) whether the district court improvidently issued the preliminary injunction.

From the turn of the century until 1974 intracity transit facilities in the City of LaCrosse, Wisconsin were furnished by the LaCrosse Transit Company, a private enterprise. During the spring of 1974 the City created the Municipal Transit Utility and applied for a capital grant from the Urban Mass Transportation Administration under the Urban Mass Transportation Act of 1964, 49 U. S. C. §§ 1601 *et seq.* The application was principally for the purpose of obtaining funds to purchase the Transit Company. Following the grant of the funds, the purchase was effected and the municipally owed bus system began operations January 1, 1975.

The Transit Company's employees have always been represented by Local Division 519, Amalgamated Transit Union, AFL-CIO, for purposes of collective bargaining, and during the period 1936-1975 they were entitled to the protection of the National Labor Relations Act, 29 U. S. C. §§ 151 *et seq.* As a result of the acquisition of the Transit Company by the Municipal Transit Utility, the employees became public employees and were no longer covered by the National Labor Relations Act. Local 519, however, continued to be their collective bargaining agent. Before the takeover, the Transit Company and the Union were parties to a collective bargaining agreement governing the wages, terms, and working conditions of the employees. The agreement covered the period from March 1973 to June 1975 and established binding arbitration for all differences relating to the terms of employment.[2]

2. Section I—Method of Negotiation

* * * * *

The Company agrees to meet with duly accredited officers and committees of the Union upon all matters relative to wages, hours and working conditions, dealing first through the Superintendent or Operations Manager; then, in case of failure to reach agreement, the matter in dispute shall be taken up with the President of the Company or his accredited representative.

(Footnote continued on next page)

The application for a federal grant was accompanied by an agreement between LaCrosse and the Union executed on April 4, 1974 and was made pursuant to the requirements of § 13(c) of the Urban Mass Transportation Act, 49 U. S. C. § 1609(c).[3]

(Footnote continued from preceding page.)

In case no agreement is reached by the representative of the Company and the Union, the matter in dispute shall be submitted, at the request of either party, to a Board of Arbitration selected in the manner hereinafter specified, and the Company and the Union agree that the decision of such Board shall be final and binding on both parties.

Section II—Method of Arbitration

All differences relating to wages, hours or working conditions of men covered by this agreement which cannot be agreed upon by collective bargaining are to be submitted for decision to an Arbitration Board consisting of Three persons, one chosen by the Company, one chosen by the Union, and two thus selected shall meet daily and select the third. In case of failure to agree on the third person after Ten days, such party shall be selected through a process of elimination, alternately, between the Company and the Union, from a list submitted by the Wisconsin Labor Relations Board. The Board so constituted shall meet within Three days and the decision rendered by this Board shall be binding upon both parties.

Either party desiring to arbitrate any case must notify the other party in writing, and the failure of either party to appoint its own Arbitrator within Ten working days after receipt of same shall forfeit its case.

Each party shall bear the expense of its own Arbitrator, and the expense of the third Arbitrator shall be borne equally by the parties hereto.

3. Section 13(c) provides:

It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees termi-

(Footnote continued on next page)

Under that section, a grant applicant is obliged to make "fair and equitable arrangements . . . to protect the interests of employees affected by such assistance" as a condition of the receipt of federal funds. Accordingly, the agreement recognized the Union as the collective bargaining representative of the employees of the Transit Utility. It also guaranteed that the Transit Utility would bargain collectively with Local 519 and would arbitrate labor disputes, including the making or maintaining of collective bargainng agreements.[4] (The 13(c) agreement did

(Footnote continued from preceding page.)

nated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(a)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

4. The 13(c) agreement provides in part:

(2) All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this agreement (including employees having already retired) under existing collective bargaining agreements or otherwise; or under any revision or renewal thereof, shall be preserved and continued: provided, however, that such rights, privileges and benefits not previously vested may be modified by collective bargaining and agreement by the operator of the transit system and the Union to substitute rights, privileges and benefits of equal or greater economic value.

(3) The collective bargaining rights of employees represented by the Union, including the right to arbitrate labor disputes and to maintain union security and checkoff arrangements, as provided by applicable laws, policies and/or existing collective bargaining agreements shall be preserved and continued. The Public Body agrees that it will bargain collectively with the Union or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreements with the Union or arrange for such agreements to be entered into, relative to all subjects which are or may be proper subjects of collective bargaining with a private employer.

* * * * *

(11) In the event of any labor dispute involving the Public Body and the employees covered by this agreement which cannot be settled within thirty (30) days after such dispute first arises, such dispute may be submitted at the written request of

(Footnote continued on next page)

not, however, provide a procedure for enforcing these rights.) The agreement was approved by the Secretary of Labor on May 1, 1974 and was incorporated into the capital grant contract between LaCrosse and the United States, which was concluded in November 1974.[5]

(Footnote continued from preceding page.)

either the Union or the Public Body to a board of arbitration selected in accordance with the existing collective bargaining agreement, if any, or if none, as hereinafter provided. . . . The term "labor dispute" shall be broadly construed and shall include, but not be limited to, any controversy concerning wages, salaries, hours, working conditions or benefits, including health and welfare, sick leave, insurance or pension and retirement provisions, the making or maintaining of collective bargaining agreements, the terms to be included in such agreements and the interpretation and application of such collective bargaining agreements.

* * * * *

(17) If this Project is approved for assistance under the Act, the foregoing terms and conditions shall be made part of the contract of assistance between the Federal Government, and the applicant for federal funds, provided, however, that this agreement shall not merge into the contract of assistance, but shall be independently binding and enforceable by and upon the parties hereto, in accordance with its terms; nor shall the collective bargaining agreement between the Union and the operator of the transit system merge into this agreement, but each shall be independently binding and enforceable by and upon the parties thereto, in accordance with its terms.

5. The contract reads in pertinent part:

Sec. 5. *Labor Protection*—The Public Body agrees to undertake, carry out, and complete the Project under the terms and conditions determined by the Secretary of Labor to be fair and equitable to protect the interests of employees affected by the Project and meeting the requirements of Section 13(c) of the Act.

These terms and conditions are specified in the letter of certification to the Government from the Department of Labor dated May 1, 1974, which is incorporated herein by reference.

The Municipal Transit Utility of the City of LaCrosse and the Amalgamated Transit Union have executed an agreement, dated April 5, 1974, which provides to members of the Union protections satisfying the requirements of Section 13(c) of the Act.

(Footnote continued on next page)

There remained, however, the original collective bargaining agreement between the Union and the Transit Company which was to run until June 1975. Once the Transit Company was acquired by LaCrosse and became the Municipal Transit Utility, that original agreement would have no effect. In order to cover the period between the acquisition date of January 1, 1975 and the June 1975 expiration date of the original agreement, Local 519 and LaCrosse entered into a "conversion agreement." This agreement set forth the wages, terms, and conditions of employment for the transit employees during the interim period. Notably absent from the conversion agreement was any provision for "interest" arbitration, the arbitration of disputes over the making of subsequent collective bargaining agreements. Once they became public employees, the employees were excluded from coverage by the National Labor Relations Act and instead fell under the provisions of chapter 11 of the Wisconsin Statutes which forbade them to strike.

In June 1975 the conversion agreement expired. When negotiations for a new agreement reached an impasse, Local 519 demanded interest arbitration, invoking the provisions of the 13(c) agreement. LaCrosse disputed the Union's claim, contending that the arbitration of a new collective bargaining agreement should be undertaken pursuant to the conversion agreement. The arbitrators, rejecting LaCrosse's contention, ruled that arbitration of the terms of the new collective bargaining agreement was required by section 11 of the 13(c) agreement. The arbitrators then decided the substantive terms of the dispute between the parties.

(Footnote continued from preceding page.)

Accordingly,

a. The agreement, dated April 5, 1974, is made part of the contract of assistance, by reference; and

b. Employees of the LaCrosse Transit Company, other than those represented by unions, and employees of any other urban mass transportation carrier in the service area of the Project are afforded substantially the same levels of protection as are afforded Union members under the April 5, 1974 agreement.

The contract established by arbitration in 1975 expired June 16, 1977. Negotiations between the parties over the terms of a new contract began in early 1977, but deadlocked June 18, 1977. On July 8 the Union formally requested the Transit Utility to enter into binding arbitration of a new collective bargaining contract under the terms of the 13(c) agreement. The request was rejected by the Transit Utility. At that point the Union filed this action in the district court, alleging that LaCrosse had violated the 13(c) agreement and the grant contract between LaCrosse and the United States. The complaint requested specific performance.

Shortly after the suit was filed the district court entered a preliminary injunction requiring LaCrosse to proceed to arbitration under section 11 of the 13(c) agreement. Thereafter the defendants filed their motion to dismiss for lack of jurisdiction or to abstain. The motion was denied. At the same time the court stayed the preliminary injunction to permit the defendants to petition this court for a stay. On February 14, 1978 this court denied a stay of the preliminary injunction. By timely notice, the defendants have prosecuted this appeal.

I

A.

The primary question is whether the district court had subject matter jurisdiction under 28 U. S. C. § 1331 to consider this suit. All other questions are subordinate, including what remedy, if any, the Union might assert to enforce its alleged right to interest arbitration. The Supreme Court's decision in *Bell* v. *Hood*, 327 U. S. 678, 682 (1946), requires this approach: "Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy."

The test for determining federal subject matter jurisdiction was correctly enunciated by Judge Doyle in his memorandum opinion, reported at 445 F. Supp. 798, 804 (W. D. Wis. 1978):

> A case "arises under" the Constitution or the laws of the United States when its decision depends upon the interpretation of the Constitution or federal law, *Cohens* v. *Virginia*, 6 Wheat. 264 [19 U.S. 264], 376 (1821); that is, when the action may be defeated by one construction of law and sustained by the opposite construction. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 22 U.S. 738, 821-22 (1824); *Gully* v. *First National Bank*, 299 U.S. 109, 112 (1936); *Goldman* v. *First Savings and Loan Ass'n of Wilmette*, 518 F.2d 1247, 1251 n. 7 (7th Cir. 1975). For the purpose of federal jurisdiction, an "action" is defined in terms of the right asserted, not the remedy sought. *Cohens* v. *Virginia*, *supra* at 379. The right asserted, on which federal jurisdiction depends, must be an essential element of the plaintiff's cause of action. *Gully* v. *First National Bank*, *supra*; *Phillips Petroleum Co.* v. *Texaco, Inc.*, 415 U.S. 125, 127 (1974).

Mr. Justice Cardozo explicated the test in *Gully* v. *First National Bank*, *supra:* "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." 299 U.S. at 112 (citations omitted). Accordingly, we must inquire whether the source of an essential element of the Union's cause of action for breach of contract originates in a law of the United States.

The district court found two such elements in the Urban Mass Transportation Act: (1) a 13(c) agreement was required by § 13(c) of the Act as a condition to LaCrosse's receipt of the grant of public funds and (2) in light of the alleged circumstances, § 13(c) required that the agreement include an interest arbitration provision which was to remain in effect during the life

of the capital grant contract. When the totality of the allegations of the complaint are considered, the Union's cause of action contains the necessary elements for federal question jurisdiction irrespective of whether those allegations are bisected according to the analysis undertaken by the district court.

Congress, exercising its spending power, enacted the Urban Mass Transportation Act, which authorized the granting to public bodies, such as a municipality, of federal funds for the acquisition, construction, and improvement of mass transportation facilities. As a condition to a grant, the Act requires a contract between the United States and the public body, containing various obligations on the part of the recipient. Specifically, § 13(c) provides that, "It shall be a condition of any assistance . . . that fair and equitable arrangements are made [between the recipient and its employees], as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." The section then provides that these protective arrangements shall include provisions of the preservation of employee rights under existing collective bargaining agreements, the continuation of such agreements, and the protection of employees against a worsening of their position. Finally, § 13(c) provides that the contract for the grant shall specify the terms and conditions of the protective arrangements.

Because § 13(c) mandates a "fair and equitable arrangement" that meets the approval of the Secretary of Labor, the exact and concrete terms of an arrangement define the more general requirements of the statutory provision. The approval of the Secretary stamps the 13(c) agreement as something more than a mere private contract formulated under the aegis of a federal statute. Instead, the contract is infused with statutory prerequisites. Clearly then, the terms written into a 13(c) agreement are grounded in federal law. The validity of this view becomes even more clear when we consider that the 13(c) agreement is a part of an overall contract which is itself mandated by the Act. As we have just indicated, the Urban Mass

Transportation Act mandates the making of a 13(c) agreement containing exact, fair, and equitable arrangements that have the approval of the Secretary of Labor. But the mandate does not cease when the agreement is reached and approved; perforce it requires the parties to abide by the agreement. Therefore, if enforcement is sought, federal law questions do not "lurk" in the background, as LaCrosse contends; they become the very basis for adjudication. Ineluctably, questions concerning the validity of a contract imposed by the Act and any rights flowing from the contract require application of federal law. The situation here is fundamentally different from that where an order of a federal regulatory agency authorizing the making of a private contract is solely permissive. *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F. 2d 424 (2d Cir. 1965), *cert. denied*, 382 U. S. 1026 (1966). In contrast, a 13(c) agreement is so intertwined with the federal statutory scheme that § 1331 subject matter jurisdiction must necessarily arise.

International Association of Machinists v. *Central Airlines, Inc.*, 372 U. S. 682 (1963), is direct authority for our holding. In that case a labor union filed a suit in federal court to enforce an award made by an airline board of adjustment. The board had been established by an agreement between the airline company and a labor union pursuant to section 204 of the Railway Labor Act, 45 U. S. C. § 184, which required the creation of the board by private contract. According to the Act the award of the board was final and binding. 45 U. S. C. § 153. The Court held that the action to enforce the award arose under federal law.

As Judge Doyle noted, central to the Court's holding was its observation that the duty to create an adjustment board "was more than a casual suggestion to the air industry." 372 U. S. at 686. The Court explained:

> Although the system boards were expected to be temporary arrangements, we cannot believe that Congress intended an interim period of confusion and chaos or meant to leave the establishment of the Boards to the whim of the parties. Instead, it intended the statutory command to be legally enforceable in the courts and the boards to be organized and operated consistent with the purposes of the Act.
>
> We have held other duties imposed upon the carriers and their employees by the Railway Labor Act binding and their breach redressable in the federal courts, such as the duty to bargain, *Virginian R. Co.* v. *System Federation*, 300 U.S. 515, 545, and the duty of a certified bargaining representative to represent all members of the craft without discrimination. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192. We take a similar view of the duty to establish adjustment boards under § 204. *Id.* at 690.

The Court, then, in language peculiarly apposite to the question before us, ruled that a section 204 contract and its enforceability were governed by federal law:

> The contracts and the adjustment boards for which they provide are creations of federal law and bound to the statute and its policy. If any provision contained in a § 204 contract is enforceable, it is because of congressional sanction: "[T]he federal statute is the source of the power and authority. . . . The enactment of the federal statute . . . is the governmental action . . . though it takes a private agreement to invoke the federal sanction. . . . A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it. . . ." *Railway Dept.* v. *Hanson*, 351 U.S. 225, 232. This is, the § 204 contract, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts. *Id.* at 692.

The Court emphasized the point:

> The contract of the parties here was executed under § 204 and declares a system board award to be final, binding, and conclusive. The claim stated in the complaint is based upon the award and demands that it be enforced. Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by

> federal law and are to be answered with due regard for the statutory scheme and purpose. To the extent that the contract imposes a duty consistent with the Act to comply with the awards, that duty is a federal requirement. If Central must comply, it is because federal law requires its compliance. *Id.* at 695.

Thus, *Central Airlines* stands for the proposition that an action to enforce a contract mandated by federal statute arises under federal law.

In an attempt to distinguish this case, LaCrosse argues that "the assumption of federal jurisdiction" in *Central Airlines* "was compelled by the manifest need of the subject matter for national decisional uniformity." Brief for Defendant at 18. The argument continues: "Unlike the situation in *Central Airlines* no system of dispute resolution has been prescribed by Congress to govern the parties' relations in this case. Nor does the Urban Mass Transportation Act contain any suggestion that the 'needs of the subject matter manifestly call for uniformity'. *Id.* at 691-692." Brief for Defendant at 20, 21.

The answer to LaCrosse's argument is that the differences between the Railway Labor Act and the Urban Mass Transportation Act relate to different aspects of employer-employee relations. The former relates primarily to the resolution of labor disputes in the national railroad industry. The latter, although having for its main purpose the grant of public funds for the extension and improvement of urban transportation systems, provides for the protection and preservation of collective bargaining rights of transit employees.[6] Given this difference, both acts, nonetheless, adopt a substantially similar method to obtain

6. Although the Urban Mass Transportation Act's major concern is with the strengthening of mass transportation systems, 49 U. S. C. §§ 1601, 1601a, 1601b, both the legislative history and the Act itself also indicate a definite congressional concern for the economic interests of transit workers affected by the federal grant program. Congress recognized that upon becoming public employees, the workers might well suffer a worsening of their positions. To prevent that deterioration, the Act requires the making of arrangements to safeguard employee rights: a 13(c) agreement.

their respective objectives: a contract between the parties infused with statutory prerequisites.

As for the needs of the "subject matter uniformity," those needs are identical for the fulfillment of the respective purposes of the two Acts. In *Central Airlines*, the Court expressed it thusly:

> It is therefore the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes. It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. *Central Airlines, supra* at 690-91.

We need only substitute "§ 13(c)" for "§ 204" in the above quotation to illuminate the point.

The holding in *Central Airlines* has been explicitly recognized by this Court. *Brotherhood of Railway Clerks* v. *Special Board of Adjustment No. 605*, 410 F. 2d 520 (7th Cir. 1969), *overruled on other grounds, Merchants Dispatch Transportation Corp.* v. *Systems Federation*, 551 F. 2d 144 (7th Cir. 1977). In *Brotherhood of Railway Clerks*, the plaintiff union contended that the federal court possessed §§ 1331 and 1337 jurisdiction to review the award of a Special Board of Adjustment established by contract under a section of the Railway Labor Act which permitted such contractual arrangements for the resolution of grievance-type disputes. We rejected the plaintiff's contention, saying:

> That this case is inapplicable to the dispute before us is apparent if we keep in mind the fact that Board No. 605 is a contractual and not a statutory board. In *Central Airlines*,

> the parties agreed to establish a system board of adjustment to resolve grievance disputes. The Supreme Court, in ruling that awards of an airline system board of adjustment can be enforced in a federal court, made it clear that agreements to submit matters to these boards were not permissible but mandatory.

410 F. 2d at 523. The holding in *Brotherhood of Railway Clerks* was overruled by this court in *Merchants Dispatch*. We continued, however, to recognize the validity of *Central Airlines* as authority for our decision. 551 F. 2d at 151-52.

This court's decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975), also supports our present holding. In that case we ruled that federal question jurisdiction existed to enforce the prevailing wage requirements of the Davis-Bacon Act, 40 U. S. C. § 276a-2(b). That statute makes it a condition to the receipt of federal funds that the recipient contract with the federal government to pay laborers the prevailing wage on construction projects. Chief Judge Fairchild wrote:

> We therefore conclude that plaintiff's complaint, in that it sought to enforce defendant's contractual commitment to pay "prevailing" wages as determined by the Secretary of Labor, stated a cause of action under the Davis-Bacon Act for which relief could be granted and that subject matter jurisdiction was properly based upon 28 U. S. C. § 1337.

Id. at 588. On remand we expressly adhered to our decision on the jurisdictional question. 548 F. 2d at 695.

The Eighth Circuit's decision in *Brotherhood of Locomotive Engineers* v. *Chicago & North Western RR Co.*, 314 F. 2d 424 (8th Cir. 1963), is also pertinent to our holding. As Judge Doyle noted, the analogy of 13(c) of the Urban Mass Transportation Act and § 5(a)(f) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(f), is "obvious." A comparison of the two sections reveals a striking similarity. Apparently Congress patterned § 13(c) after § 5(2)(f). Furthermore, in *Norfolk & Western RR Co.* v. *Nemitz*, 404 U. S. 37 (1971), the Supreme Court implicitly ruled that the exercise of federal court jurisdiction was warranted in enforcing § 5(2)(f) protective agreements.

Lastly, we note that the Eighth Circuit has very recently decided the identical question that is before us, ruling that subject matter jurisdiction under 28 U. S. C. § 1331 is present. *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, ... F. 2d ....., No. 78-1255 (8th Cir., August 21, 1978).

B.

LaCrosse contends that even if the Union's case is one that "arises under" the laws of the United States it should be dismissed on the grounds that (1) the Union failed to allege in its complaint the requisite amount in controversy in order to confer jurisdiction under 28 U. S. C. § 1331 and (2) the matter in dispute does not exceed the sum of $10,000, exclusive of interest and costs.

The Union failed to plead the jurisdictional fact of the amount in controversy; however, in the absence of a specific allegation, this court may infer the required pecuniary value from the facts stated in the Union's complaint. *Giancana* v. *Johnson*, 335 F. 2d 366 (7th Cir. 1964), *cert. denied*, 379 U. S. 1001 (1965).

With respect to its second contention, LaCrosse urges that the case be dismissed because the Union is unable to establish in good faith that the matter in controversy exceeds the value of $10,000. The test for determining the minimal amount was stated in *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.* 303 U. S. 283, 288-90 (1938). There the Supreme Court ruled: "[I]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." Absolute certainty that the requisite amount is satisfied need not be met; a present probability is sufficient. *Scherr* v. *Volpe*, 336 F. Supp. 882, 885 (W. D. Wis. 1971), *aff'd*, 466 F. 2d 1027 (7th Cir. 1972). Applying the legal certainty test to a case seeking equitable relief, the jurisdictional amount is to be measured by the value to the complainant of the right which it

seeks to protect. *City of Milwaukee* v. *Saxbe*, 546 F. 2d 693, 702 (7th Cir. 1976).

The district court resolved the issue of jurisdictional amount by relying on the claims of the Union's members. *See Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333 (1977). Accordingly, it determined that the value of a new collective bargaining agreement, at least for some of the individual union members, would exceed $10,000. It was not necessary, however, for the district court to resort to the claims of the individual union members to meet the requisite amount in controversy. The essential object sought to be protected by the Union in this action is the right to an arbitration award when a new contract cannot be reached through bargaining. That right, therefore, is the matter in dispute and its value determines the jurisdictional amount. *See Davenport* v. *Procter & Gamble Mfg. Co.*, 241 F. 2d 511, 514 (1957); 2 J. Moore, *Federal Practice* ¶ 0.92[5] at 880 (2d ed. 1972). There is no difficulty translating this right into pecuniary terms. The Union is seeking a new collective bargaining agreement for thirty-two employees. It is certain from the facts in the case that a new contract will not be valued at $10,000 or less. It may be readily inferred that past collective bargaining agreements entered into by the Union as representative of these employees involved sums which far exceeded the required jurisdictional amount.

Our determination that the value of the arbitration award of a new collective bargaining agreement may satisfy the $10,000 amount-in-controversy requirement of § 1331 is not an aggregation of the individual claims of the Union members. We agree with the Union that it has an economic interest in a new collective bargaining contract apart from that of the members' interest in the agreement's provisions concerning wages and terms and conditions of employment. *See Smith* v. *Evening News Ass'n*, 371 U. S. 195, 200 (1962); *J. I. Case Co.* v. *NLRB*, 321 U. S. 332 (1945); *NLRB* v. *Allis Chalmers Mfg. Co.*, 388 U. S. 175 (1967). Accordingly, the district court was correct in not dismissing the complaint for insufficiency of the amount in controversy.

C.

We turn to the question of whether the Union is entitled to a remedy in federal court. It would seem axiomatic that there is a private right of action to enforce the 13(c) agreement by injunctive relief. By definition a contract is a promise enforceable by law. 1 A. Corbin, *Contracts* § 3 (1963). We agree with Judge Doyle's statement: "Congress intended that the contracts embodying the 'fair and equitable arrangements' were to be enforceable contracts. It would be fatuous to suggest otherwise. Because the contracts were to be enforceable, it follows that they were to be enforced at the instance of the parties to the contracts." 445 F. Supp. at 811.

Based upon this premise, it follows that since the test for federal question jurisdiction has been met the remedy lies in federal court. The statutory scheme outlined in the Urban Mass Transportation Act and the policy underlying § 13(c) of the Act implies a federal private remedy. Support for this holding is found in *Central Airlines*. There the Court implicitly recognized the existence of a federal private remedy. Also supportive is our statement in *McDaniel II:* "The policy behind the remedy itself, a private suit, is not really in question." 548 F. 2d at 684. Because of our holding, an analysis under *Cort* v. *Ash*, 422 U. S. 66 (1975), is unnecessary. That case is inapposite.

II

Finding jurisdiction, we consider the issue of whether the district court as a matter of equitable discretion should have declined to entertain the suit. We hold that the application of the abstention doctrine is not appropriate in this case.

We begin with the rule that "[t]he doctrine of abstention, under which a District Court may decline to exercise or postpone

the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185, 188-89 (1959), as cited in *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 813 (1976). LaCrosse contends that this case is an exception to the general rule. In particular, it asserts that federal court action would needlessly interfere with the state's administration of its own affairs and disrupt Wisconsin's efforts to establish a coherent policy concerning the relationship between the state and its public employees. *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943); *Alabama Public Service Comm'n* v. *Southern Ry. Co.*, 341 U. S. 341 (1951); and *Kelly Services, Inc.* v. *Johnson*, 542 F. 2d 31 (7th Cir. 1976).

The present case does not fall within the category of *Burford*-type abstention upon which LaCrosse relies. The Union seeks to enforce a federal right to interest arbitration. There is no complex issue of local law involved in this case which compels the Union to take advantage of Wisconsin's procedural opportunities. Additionally, the fact that the interest arbitration required in this case may conflict with similar rights provided for under the Wisconsin Municipal Employment Relations Law does not, without more, require abstention. *See Colorado River Water Conservation Dist.* v. *United States*, *supra* at 816. We conclude, therefore, that the district court did not abuse its discretion by refusing to abstain from consideration of this case.

III

The remaining issue, whether the district court abused its discretion by granting a preliminary injunction compelling

LaCrosse to proceed to arbitration, may be disposed of summarily.

The standard for the appellate test of a preliminary injunction was set forth by this court in *Scherr* v. *Volpe*, 466 F. 2d 1027, 1030 (7th Cir. 1972):

> We start with the observation that our function in reviewing the entry of a preliminary injunction is a limited one. Appellate tribunals may set aside the issuance of such injunctions only where it can be said that the discretion vested in the district court with respect to these matters has been improvidently exercised . . . .

466 F. 2d at 1030. Absent a clear abuse of discretion, the district court's process of balancing the probabilities of ultimate success at the final hearing with the consequences of immediate irreparable injury which could possibly result from the denial of preliminary relief will not be disrupted on appeal. *Id.* at 1030.

We have previously indicated the four prerequisites against which the discretion exercised by the district court must be measured: (1) the plaintiff has at least a reasonable likelihood of success on the merits; (2) the plaintiff has no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (3) the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on the defendant; and (4) the granting of the preliminary injunction will not disserve the public interest. *Fox Valley Harvestore* v. *A. O. Smith Harvestore Prod., Inc.*, 545 F. 2d 1096, 1097 (7th Cir. 1976).

The district court found on the basis of the facts before it that the Union had a reasonable likelihood of success on the merits. This criterion is "necessarily a somewhat flexible standard that allows the chancellor room for the exercise of judgment." *Mullis* v. *Arco Petroleum Corp.*, 502 F. 2d 290, 293 (7th Cir. 1974). The factual background of this case is virually undisputed. As to the legal issues involved, we cannot say that the district court abused its discretion in finding that the

Union enjoyed a "good chance" to succeed ultimately in this case.

Turning to the second requirement, the finding of irreparable injury to the Union if LaCrosse did not proceed to compulsory arbitration cannot be considered an abuse of discretion. At the time of the lawsuit, the employees were working without a collective bargaining agreement and negotiations were at an impasse. Similarly, we are convinced that the district court did not abuse its discretion in ruling on the other prerequisites to the issuance of a preliminary injunction.

Although we believe that an evidentiary hearing would be better practice when district courts are asked to grant interlocutory relief, we do not perceive any procedural defect here. When considering the preliminary injunction, the district court had before it the Union's verified complaint and motion for a preliminary injunction, both of which were accompanied by exhibits. LaCrosse's answer was before the court and both parties filed memoranda concerning the Union's motion. LaCrosse defended on the grounds that the Union waived its rights, but failed to present any evidence on the waiver issue other than the conversion agreement. It chose not to file affidavits contradicting the matters set forth in the affidavit proffered by the Union, despite the instructions of the district court. Accordingly, LaCrosse's contention on appeal that the district court abused its discretion in issuing injunctive relief will not be accepted.

The district court's order granting the preliminary injunction is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 78-1077.

LOCAL DIVISION NO. 714,
AMALGAMATED TRANSIT UNION, AFL-CIO,
AN UNINCORPORATED ASSOCIATION,

Plaintiff, Appellant,

vs.

GREATER PORTLAND TRANSIT DISTRICT
OF PORTLAND, MAINE, A BODY POLITIC,

Defendant, Appellee.

Appeal from the United States District Court
for the District of Maine.

[Hon. Edward T. Gignoux, *U. S. District Judge.*]

Before Coffin, *Chief Judge,*
Campbell and Bownes, *Circuit Judges.*

Lawrence J. Zuckerman, with whom ***Earle W. Putnam,*** was on brief, for appellant.

Brenda T. Piampiano, with whom ***F. Paul Frinsko,*** and ***Bernstein, Shur, Sawyer & Nelson,*** were on brief, for appellee.

November 15, 1978

CAMPBELL, *Circuit Judge*. This appeal concerns an action brought in the District Court for the District of Maine by Local Division 714, Amalgamated Transit Union (the Union) seeking a declaratory judgment and injunction against the Greater Portland Transit District (the District) for its refusal to submit the parties' dispute regarding terms of a new collective bargaining agreement to binding arbitration. Arbitration of the terms of a new contract—known as "interest arbitration"—is alleged to be required by an agreement the parties entered into pursuant to § 13(c) of the Urban Mass Transportation Act, 49 U. S. C. § 1609(c) (UMTA). The court below, ruling from the bench dismissed the Union's suit for lack of subject matter jurisdiction, and the Union has appealed. We are thus faced with the narrow but important question of whether the federal courts are vested with the authority to hear labor disputes of this type between the recipients of UMTA grants and their employees.

I.

Under the UMTA, state and local agencies may obtain federal financial assistance for the providing of mass transportation services in urban areas. 49 U. S. C. § 1602. Section 13(c) of the Act, 49 U. S. C. § 1609(c), establishes as "a condition of any assistance . . . that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." The section then proceeds to specify what the labor protective arrangements are to accomplish, including the preservation of existing collective bargaining rights. Finally, § 13(c) directs that the "terms and conditions of the protective arrangements" shall be specified in the financial assistance contract itself—viz. the contract between the local authority and federal government.[1] In practice,

1. Section 13(c) provides in full:

"(c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the

(Footnote continued on next page)

the statute seems to have been read as leaving to the applicant for federal assistance and its employees, or their bargaining representative, the negotiating of a written agreement (called a § 13(c) agreement) containing the precise terms of mutually satisfactory protective arrangements, followed by approval of that agreement by the Secretary of Labor.

The case before us arises out of several financial assistance contracts between the District and the federal government. The District, a Maine state agency, has as its purpose the providing of motor vehicle mass transportation in the greater Portland area. From 1970 until early 1973, the District owned the office and garage facilities where buses were parked and maintained, but leased the facilities to the Greater Portland Transit Company, a private corporation, which operated the transportation services. Before and during this period, the Transit Company's employees were protected by the Labor Management Relations Act, 29 U. S. C. §§ 141-87, and the Union and the Transit Company were parties to successive collective bargaining agreements.

In late 1972, the District arranged to purchase the Transit Company. The District entered into a Capital Grant Contract

(Footnote continued from preceding page.)

interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the contnuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priorty of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements."

(Grant No. 1) with the United States, pursuant to the UMTA, to receive federal funds for the project. The "project" was defined as the purchase of the Transit Company's assets, 15 new buses, and 15 locked registering fare boxes. The grant contract obliged the District to complete the project under the labor protective provisions of a § 13(c) agreement between the District and the Union dated December 8, 1972 ("1972 § 13(c) Agreement"), which the Secretary of Labor had approved; these provisions were incorporated by reference into the grant contract. The § 13(c) agreement provided in part for binding arbitration of labor disputes, including interest arbitration of the terms of new collective bargaining agreements.[2]

The District after receiving funding under the Act purchased the Transit Company's assets on January 1, 1973. Pursuant to the 1972 § 13(c) Agreement, the District succeeded to the Company's obligations under the then-existing collective bargaining agreement, which was due to terminate on December 31, 1973. When the agreement terminated, the Union and the District arrived at a new collective bargaining agreement apparently by utilizing, after impasse had been reached, the dispute settlement procedures provided by the Maine Public Employees Relations Law, 26 M. R. S. A. §§ 961 *et seq.*, rather than the binding interest arbitration provided by the 1972 § 13(c) Agreement. One procedure used was fact-finding in which both the District and the Union participated. The resulting 1974 collective bargaining agreement, as had the previous collective bargaining agreements, provided for non-interest arbitration but explicitly denied any requirement of interest arbitration. This

2. Interest arbitration differs from the arbitration of grievances in that the latter calls for the arbitrator merely to "apply the contract" to the facts of a particular situation, while the former leaves to the arbitrator the determining of the terms and conditions of the next labor contract between the parties. Section 13(c) does not expressly require that labor protective arrangements provide for interest arbitration in order to conform to statutory norms; and it is not represented that the Secretary of Labor has made any such requirement as a precondition to his approval.

collective bargaining agreement had an expiration date of December 31, 1976.

In February 1975, the District and the Union entered into a second § 13(c) agreement ("1975 § 13(c) Agreement"), in relation to an application by the District for UMTA funding for the purchase of 35 new buses and fare boxes. This agreement again mandated binding interest arbitration. The agreement provided further that it would be "independently binding and enforceable by and upon the parties thereto . . . ." The Secretary of Labor approved this 1975 § 13(c) Agreement, and its employee protections became part of a Capital Grant Contract (Grant No. 2) with the United States for funding for the purchase of 39 new buses and fare boxes, which was executed in November 1975. At the same time, the District and the United States entered into an Operating Assistance Grant Contract (Grant No. 3) covering the District's operating expenses for calendar year 1975.

A year later, in November 1976, the District became a party to another § 13(c) agreement. This was the "National § 13(c) Agreement," which had been executed by the American Public Transit Association and the Transit Employee Labor Organizations in July 1975. The District became a party thereto by notifying the appropriate parties of its desire to have that agreement apply to the District's grants of operating assistance under the UMTA. The District requested specifically that "all applications submitted for Federal Operating Assistance under Section 5 and 3(H) of the Act for the period November 26, 1974 through September 30, 1977 *not heretofore certified* by the Department of Labor be certified on the basis of the [National § 13(c) Agreement]." The Secretary of Labor certified the National § 13(c) Agreement for the District and the Union in November 1976. As the District's only previous application for operating assistance (Grant No. 3) already had been certified by the Secretary, however, the National § 13(c) Agreement apparently did not become part of a contract of assistance until

April 1977. At that time the District and the United States entered into an Operating Assistance Contract (Grant No. 4) to cover the District's operating expenses for calendar year 1976. The National § 13(c) Agreement provided for binding non-interest arbitration, but did not itself provide for interest arbitration. Arguably, however, it incorporated the interest arbitration requirements of the prior § 13(c) agreements.

After the National § 13(c) Agreement was executed but before it was incorporated into the Grant No. 4 contract, the 1974 collective bargaining agreement terminated and the instant litigation arose. During the two months prior to the December 31, 1976 termination date, the District and the Union negotiated toward a new collective bargaining agreement. Early in January 1977, the negotiations reached impasse, and the parties were unable to agree as to what was the appropriate dispute settlement procedure to follow. The Union requested binding interest arbitration pursuant to the 1975 § 13(c) Agreement. The District refused, and instead had a mediator appointed by the Maine Labor Relations Board.

In March of 1977, the Union filed this complaint in the United States District Court for the District of Maine, asking for a declaration and injunction requiring the District to submit the disputed terms of the new collective bargaining agreement to binding interest arbitration pursuant to the 1975 § 13(c) Agreement. The complaint contains four counts: (1) that the District's refusal to arbitrate was a breach of the 1975 § 13(c) Agreement and thereby did not comply with § 13(c) of the UMTA; (2) that the District's refusal to arbitrate violated Maine law; (3) that the District's refusal violated the National § 13(c) Agreement; and (4) that the District violated the 1974 collective bargaining agreement by refusing to bargain in good faith. The Union premised jurisdiction on 28 U. S. C. §§ 1331 and 1337. The District's answer denied that the 1975 § 13(c) Agreement was in "full force and effect," denied that it was an industry affecting commerce (as required by § 1337), alleged as a defense

that it was a quasi-municipal corporation and a political subdivision of the State of Maine, and asserted that the court lacked subject matter jurisdiction.

Since this appeal does not deal with the merits of the present dispute, we need not delve deeply into the parties' substantive contentions. The Union, suffice to say, feels the 1975 § 13(c) Agreement, mandating interest arbitration, is controlling and was operable in late 1976 and early 1977 because the project covered by Grant No. 2, the purchase of 39 new buses and fare boxes, was not yet completed. This view arguably aligns with the apparent intention of Grant Contract No. 2 that the 1975 § 13(c) Agreement would be in effect until the project, the purchase, was finished. The Union argues that the incorporation of the National § 13(c) Agreement into the subsequent assistance contract was not meant to preempt the prior § 13(c) agreement. The District, on the other hand, argues that the parties never meant to require binding interest arbitration. It points to the provision of the 1974 collective bargaining agreement expressly precluding interest arbitration, as well as to the fact that the parties utilized Maine's dispute settlement procedures in their 1974 collective bargaining. The District maintains that it was told and believed that the National § 13(c) Agreement superseded the 1975 § 13(c) Agreement. Further, it argues that because the employees have not been adversely affected by the federal grants, no contract rights ever arose under the 1975 § 13(c) Agreement. *See* 49 U. S. C. § 1609(c). Finally, the District challenges the enforceability of the 1975 § 13(c) Agreement's interest arbitration requirement on the ground that it lacked authority ever to agree to any such requirement.

The district court's order dismissing the suit for lack of subject matter jurisdiction was in response to the District's motion to dismiss both on that ground and for failure of the complaint to state a claim upon which relief could be granted. We address

both grounds herein, both having been presented below. We turn first to the question of jurisdiction.

II.

The Union asserts the existence of federal jurisdiction under 28 U. S. C. §§ 1331 and 1337. Both of these provisions require that the action "arise under" federal law, and it is well-established that the "arising under" test is the same for either section. *Jersey Central Power & Light Co.* v. *Local Unions, IBEW*, 508 F. 2d 687, 699 n.34 (3d Cir. 1975), *cert. denied*, 425 U. S. 998 (1976); *see Peyton* v. *Railway Express Agency, Inc.*, 316 U. S. 350, 353 (1942). In *Gully* v. *First National Bank*, 299 U. S. 109, 112-13 (1936), the Supreme Court said,

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Starin* v. *New York*, 115 U. S. 248, 257; *First National Bank* v. *Williams*, 252 U. S. 504, 512. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Ibid; King County* v. *Seattle School District*, 263 U. S. 361, 363, 364. A genuine and present controversy, not merely a possible or conjectural one, much exist with reference thereto (*New Orleans* v. *Benjamin*, 153 U. S. 411, 424; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 191; *Joy* v. *St. Louis*, 201 U. S. 332; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. *Tennessee* v. *Union & Planters Bank*, 152 U. S. 454; *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25; *Taylor* v. *Anderson*, 234 U. S. 74. Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. *Devine* v. *Los Angeles*, 202 U. S. 313, 334; *The Fair* v. *Kohler Die & Specialty Co., supra.*"

For a recent case reaffirming these principles, *see Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U. S. 125 (1974). *See generally* 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3562 (1975). The essential inquiry is thus whether the complaint, on its face, alleges a cause of action based on a right created by federal law, and whether the construction given to the federal law will be pivotal in the particular case.

Bell v. *Hood*, 327 U. S. 678 (1946), had more to say about "arising under" jurisdiction. *Bell* involved an action for damages brought by private parties against FBI agents for alleged violations of fourth and fifth amendment rights. The lower courts dismissed for want of federal jurisdiction. The Supreme Court reversed, holding that because the complaint squarely sought recovery on the ground that the agents violated the Constitution, federal question jurisdiction existed regardless of whether or not there was a federal cause of action or whether the complaint also alleged a state law claim.[3] The Court stated the jurisdictional rule as follows:

> "[W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions . . . , must entertain the suit. . . .
>
> ". . . The . . . exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim . . . clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

Id. at 681-83. The Court added that if the complaint failed to state a proper cause of action, the correct disposition would

3. The *Bell* Court concluded that the claim for damages based on fourth and fifth amendment violations sufficed to establish federal question jurisdiction, even though *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971), had not yet been decided.

not be dismissal for want of subject matter jurisdiction. Rather, a judgment on the merits in the form of a dismissal for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), would be appropriate. 327 U. S. at 682; *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (1st Cir. 1950).[4]

To apply these principles here, we first have to determine the theory of recovery set out in the complaint. Three interpretations can be advanced. The narrowest would be that the complaint shows, at most, a violation of a private contractual agreement between the Union and the District. The broadest would be that the complaint shows a violation of § 13(c) on the theory that § 13(c) commands interest arbitration—a command the District ignored. A middle ground would be that the complaint shows a § 13(c) violation, not because § 13(c) requires interest arbitration, but because § 13(c), as a matter of clear inference, directs compliance with the mandated labor protective arrangements and implies a federal remedy for breach thereof in favor of those employees for whose benefit § 13(c) was enacted.

The district court read the complaint narrowly, as setting forth only a violation of private contract, rather than a violation of § 13(c). It reasoned that even though § 13(c) was "the principal factor leading the parties to enter into the agreement," the suit was on the contract, not the federal statute. On this premise, the complaint would not be viewed to be "so drawn as to seek recovery directly under the . . . laws of the United States." *Bell* v. *Hood*, 327 U. S. at 681.

The district court further reasoned that any right the Union had to interest arbitration stemmed from the § 13(c) agreement, not § 13(c) itself. It thus rejected what we have termed the "broadest" construction of the complaint, namely, that relief is

4. On remand, the district court in *Bell* v. *Hood* took jurisdiction but dismissed the suit for failure to state a federal cause of action. 71 F. Supp. 813, 820-21 (S. D. Cal. 1947).

justified because § 13(c) itself commands interest arbitration. This latter construction was accepted by the district court in *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, 445 F. Supp. 798 (W. D. Wis. 1978), *aff'd*, No. 77-1981 (7th Cir. Oct. 19, 1978). The *LaCrosse* district court credited the allegation that § 13(c) itself commanded interest arbitration under the circumstances, and on that basis found federal question jurisdiction to be present. This interpretation seems to us somewhat questionable. The statute does not mention interest arbitration, and while an interest arbitration provision in a § 13(c) agreement may possibly be seen as carrying out one or more of the five substantive labor protections guaranteed in § 13(c),[5] we are unable to translate any of these into a hard and fast command that interest arbitration be provided. In any event, we do not understand the present complaint to allege that the refusal to engage in interest arbitration constitutes, *per se*, a direct violation of the federal statute. Hence we agree with the district court that federal jurisdiction is not to be premised on this construction.

We think, however, that the district court erred in failing to deal with the third, middle-ground, construction of the complaint. In its complaint, the Union expressly alleged that breach of the § 13(c) agreement constituted noncompliance with § 13(c) of the UMTA. The Union thus advanced the theory that breach of the terms of a labor protective arrangement made pursuant to the command of § 13(c) contravened that statute. The Union contends that by making it a condition of financial

5. The "protective arrangements" mandated in § 13(c), "shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs." *See* note 1, *supra*, for full text of § 13(c).

assistance that the District enter into fair and equitable arrangements as determined by the Secretary of Labor, and by commanding that the terms and conditions of such arrangements become part of the grant contract, Congress implicitly mandated both compliance with those arrangements and a federal remedy for their breach.

We think this reading of the complaint is compelled by its language, and that it precludes a ruling of no federal jurisdiction. *Accord, Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, No. 77-1981, slip op. at 10 (7th Cir. Oct. 19, 1978); *Division 1207, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, No. 78-1255, slip op. at 11-13 (8th Cir. Aug. 21, 1978). Jurisdiction does not even require that the complaint necessarily state a valid claim upon which relief can be granted; all that is required is that the complaint is "so drawn as to seek recovery directly under the . . . laws of the United States . . . ." *Bell* v. *Hood*, 327 U. S. at 681. As the present complaint was so drawn, it states a claim arising under federal law unless the assertion that rights under § 13(c) were denied by the District's refusal to arbitrate either "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction," or "is wholly insubstantial and frivolous." *Id.* at 682-83.

Plainly the assertion of a § 13(c) violation is not "immaterial": the agreement for whose breach the Union seeks relief came into being because of § 13(c). Nor is it patently frivolous to contend that breach of labor protective arrangements formed under § 13(c) violates § 13(c) itself, or gives rise to a federal remedy. It is true that three district courts have found subject matter jurisdiction lacking in similar settings on essentially this basis, although they did not couch their determination in *Bell's* "wholly insubstantial and frivolous" phraseology. *See Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Authority*, No. C-76-104-E (W. D. Tenn. Dec. 23, 1977), *appeal docketed*, No. 78-1185 (6th Cir. May 16, 1978; *Division*

580, Amalgamated Transit Union v. *Central New York Regional Transportation Authority*, No. 77-CV-45 (N. D. N. Y. Oct. 19, 1977), *vacated as moot*, No. 77-7546 (2d Cir. June 7, 1978); *Metropolitan Atlanta Rapid Transit Authority* v. *Local Division 732, Amalgamated Transit Union*, No. 18429 (N. D. Ga. July 11, 1973). Each of those courts acknowledged the complaint before it to claim that the alleged violation of the § 13(c) labor protective agreement constituted a violation of § 13(c) itself, but denied federal question jurisdiction because it saw no federal issue involved. But, two federal issues obviously were raised: first, whether breach of the terms of labor protective arrangements made under § 13(c) violates § 13(c), and second, whether there is a federal cause of action for such a breach. The *Jackson, Atlanta,* and *Central New York* courts evidently felt those issues to be so insubstantial as to require disposition on jurisdictional grounds. The district court's decision below also can be viewed this way, rather than as having narrowly interpreted the complaint not to allege a violation of § 13(c). We cannot, however, accept the conclusion of frivolity. Two circuit courts, in the *Kansas City* and *LaCrosse* cases, *supra,* have recently found federal jurisdiction in circumstances very similar to this; and, as our later analysis indicates, we are ourselves persuaded to imply from § 13(c) a federal remedy.

The criteria stated in *Gully* and *Bell* v. *Hood* are satisfied when the complaint is read in the foregoing manner. The claim presents the court with the two issues mentioned in the preceding paragraph, plus (assuming the first two are surmounted) the issue on the merits of whether there actually was a violation of the § 13(c) agreement here.

Our conclusion that federal question jurisdiction is appropriate is reinforced by *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682 (1963). In that case an airline board of adjustment was set up by an agreement between Central Airlines and its employees' union pursuant to section 204 of the Railway Labor Act, 45 U. S. C. § 184, which required

that the board be established by a private contract. It was the board's function to resolve disputes growing out of application of the parties' collective bargaining agreement, and under the Act the board's awards were final and binding, 45 U. S. C. § 153 Second. The litigation arose when the union sought enforcement of such an award in federal court upon the airline's refusal to comply therewith. The Supreme Court held that the action to enforce the award arose under federal law, giving rise to federal question jurisdiction. The thrust of the Court's analysis was as follows:

> "The contracts and the adjustment boards for which they provide are creations of federal law and bound to the statute and its policy. If any provision contained in a § 204 contract is enforceable, it is because of congressional sanction: '[T]he federal statute is the source of the power and authority . . . The enactment of the federal statute . . . is the governmental action . . . though it takes a private agreement to invoke the federal sanction . . . A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it . . .' *Railway Dept.* v. *Hanson*, 351 U. S. 225, 232. That is, the § 204 contract, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts."

372 U. S. at 692. Because the instant case likewise involves enforcement of a contract formed pursuant to federal law, *Central Airlines* supports our conclusion that federal question jurisdiction exists.[6]

6. While *Central Airlines* provides support for our conclusion that jurisdiction is present here, it is not on all fours with the instant case. The right sought to be enforced in *Central Airlines*—the right to binding arbitration—was expressly created by the statute. The statute required the creation of the board of adjustment, 45 U. S. C. § 184, and specified that it would settle labor disputes through binding arbitration, 45 U. S. C. § 153 Second. The mandated contract served only to implement that right by creating the board. In the instant case, on the contrary, the right to arbitration sought to be enforced was created by the mandated contract only, not by § 13(c).

In addition to the presence of a substantial federal question, a prerequisite for jurisdiction under 28 U. S. C. § 1331 is that "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs . . ."[7] The Union's amended complaint made the following allegation regarding the amount in controversy:

> "Plaintiff has been damaged in an amount greater than $10,000.00 by virtue of Defendant's refusal to pay cost-of-living escalator increments as under the expired working agreement, and because of, among other things, Defendant's refusal to arbitrate, the members of the Plaintiff are without a pension plan, do not have unemployment benefits, and are in a state of limbo without assurance of employment, all of which is in excess of the $10,000.00 jurisdictional amount."

The District argues that the Union has not shown by this allegation that the requisite amount is in controversy. We note at the outset that in the similar *Kansas City* and *LaCrosse* cases, the eighth and seventh circuits respectively found the $10,000 jurisdictional amount to be in controversy. *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, No. 78-1255, slip op. at 7 (8th Cir. Aug. 21, 1978); *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, No. 77-1981, slip op. at 15-17 (7th Cir. Oct. 19, 1978).

In *Saint Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288-89 (1938), the Supreme Court set out what remain the controlling principles guiding a determination of whether or not an action meets the jurisdictional amount:

> "The rule governing dismissal for want of jurisdiction in cases brought in federal court is that, unless the law gives

7. There is no jurisdictional amount requirement under § 1337, the alternative provision under which jurisdiction is here asserted; however, the statute sought to be enforced must regulate commerce or protect trade and commerce. We do not reach the question of the applicability of § 1337 in view of our conclusion that the jurisdictional amount requirement of § 1331 is satisfied.

> a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." [Citations omitted.]

See Jimenez Puig v. *Avis Rent-A-Car System*, 574 F. 2d 37 (1st Cir. 1978). These principles apply equally to actions for declaratory and injunctive relief. *See Hunt* v. *Washington Apple Advertising Commission*, 432 U. S. 333, 346 (1977). There is no indication that the Union's jurisdictional amount assertion was not made in good faith. Accordingly, to warrant dismissal of the complaint on jurisdictional amount grounds it would have to appear "to a legal certainty" that the amount in controversy actually does not exceed $10,000. Such is not the case here.

The Union is suing in its representative capacity to vindicate the rights of employees to binding interest arbitration under the collective § 13(c) protective arrangements. It has standing to do so. *See Smith* v. *Evening News Association*, 371 U. S. 195, 200 (1962); *cf. Warth* v. *Seldin*, 422 U. S. 490, 511 (1975) (an association may have standing solely as representative of its members). The Union therefore can rely upon the actual or threatened injury to individual employees in establishing the jurisdictional amount. *Hunt* v. *Washington Apple Advertising Commission*, 432 U. S. at 346.

The Supreme Court held in *Hunt* that a representative plaintiff such as the Union can establish the requisite amount in controversy if the claims of at least some of the individuals represented exceed that amount. Thus, the jurisdictional amount in controversy is met in this case unless it is clear "to a legal certainty" that the rights to interest arbitration of not even some of the employees is worth $10,000. It is hard to say this is so. But we do not rest on that premise. We would also venture that the Union is entitled to aggregate the value of its members' claims to satisfy the jurisdictional amount requirement. To be sure, the Supreme Court in *Hunt* reserved the question of whether

a representative plaintiff could aggregate individual claims in establishing the jurisdictional amount. But while the issue is thus as yet undecided, there are convincing reasons to aggregate in these circumstances.

It is the rule that "when several plaintiffs united to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." *Zahn* v. *International Paper Co.*, 414 U. S. 291, 294 (1973), *quoting Troy Bank* v. *G. A. Whitehead & Co.*, 222 U. S. 39, 40-41 (1911). On the other hand, when two or more plaintiffs having "separate and distinct" claims unite for "convenience and economy" in a single class action, each member of the class must satisfy the jurisdictional amount requirement. *Id.; Snyder* v. *Harris*, 394 U. S. 332 (1969). The distinction between "a common and undivided interest" and "separate and distinct" claims is not entirely clear, C. Wright, Law of Federal Courts § 36, at 139 (3d ed. 1976). It can nonetheless be said that the individual employees in the present case are not united merely for litigation "convenience and economy" as in *Zahn* and *Snyder*. Their claims are united in this single action by the Union in conformance with the fundamental premise of collective bargaining that a union is to represent its members in all aspects of the labor-management relationship. This premise is part of national labor policy. *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U. S. 175, 180 (1967). Also, any right to interest arbitration under the § 13(c) agreement cannot be viewed practically as a right possessed by each employee individually because it can only be exercised collectively. To be sure, each employee benefits from that right; it has economic value to each that should be included in determining the amount in controversy. But its collective nature would seem to make it a "single right," within the meaning of *Troy Bank*.

Moreover, in actions seeking declaratory or injunctive relief the amount in controversy is measured by the value of the object of the litigation. *Hunt* v. *Washington Apple Advertising*

Commission, 432 U. S. at 347; *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 181 (1936); *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 239 U. S. 121, 126 (1915); *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 336 (1907); 1 J. Moore, Federal Practice ¶¶ 0.95, 0.96 (2d ed. 1975); C. Wright, A. Miller & E. Cooper, *supra*, § 3708. The Union's object is binding arbitration of the disputed terms of the parties' collective bargaining agreement.[8] The value of that arbitration would seem to be the difference between the expected value of the terms under the arbitration award and the value of the terms that would exist in the absence of arbitration. The value of the arbitration is impossible to determine precisely, because both the terms of the arbitration award and the terms of employment in the absence of arbitration are speculative. These valuation problems make it virtually impossible to conclude to a legal certainty on the current record that the amount in controversy is less than the required $10,000. This is especially so, because of the reasonableness of the claim that the aggregate interest of the 107 employees exceeds $10,000. The District presently is paying wages (presumably at the rate set by the former collective bargaining agreement), but has not made cost-of-living increases as called for by the former agreement. On this cost-of-living factor alone, the Union claims a $35,000 total loss. Further, it is not clear whether or not the District, in the absence of a new agreement, would abide by other provisions of the former agreement, such as those governing discipline and discharge

8. *Davenport* v. *Procter & Gamble Mfg. Co.*, 241 F. 2d 511 (2d Cir. 1957), involved a diversity action by a union president to compel the employer to arbitrate a dispute over the wage rate, as required by the collective bargaining agreement. The court held that the jurisdictional amount requirement was satisfied, stating:

> "In considering the jurisdictional amount requirement the court should look through to the possible award resulting from the desired arbitration, since the petition to compel arbitration is only the initial step in a litigation which seeks as its goal a judgment affirming the award."

Id. at 514.

procedures, grievances, vacations, medical insurance, or pensions. In light of these considerations, we conclude that the Union's allegation that the amount in controversy exceeds $10,000 satisfies the jurisdictional amount requirement of § 1331, and that subject matter jurisdiction over the Union's action exists pursuant to that provision. In view of this, we need not consider the applicability of § 1337.

III.

While contrary to the district court we conclude that there is subject matter jurisdiction, that ruling does not end matters. Notwithstanding federal jurisdiction over the subject matter of the Union's § 13(c) claim, the summary dismissal by the district court must be affirmed if the Union has failed to state a claim upon which relief can be granted. *See, e.g., Wheeldin* v. *Wheeler*, 373 U. S. 647, 649 (1963); *Bell* v. *Hood*, 327 U. S. 678 (1946); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (1st Cir. 1950).[9]

The Union's claim, as stated earlier, is that by violating the § 13(c) agreement, the District violated § 13(c) itself. The theory underlying this claim is that § 13(c) requires compliance with whatever labor protective arrangements are developed under its mandate, approved by the Secretary of Labor, and specified in an UMTA assistance contract. A two-part inquiry is necessary to determine whether this claim is remediable.[10] We first must decide whether a breach of such a protective

9. The issue of implied remedy was raised in the district court by appellee's motion to dismiss for failure to state a claim, and has, in full substance, been argued and briefed by both sides, albeit in the context of determining whether the Union's claim was insubstantial, frivolous or made solely to obtain jurisdiction. The issue is closely interwoven with the question of subject matter jurisdiction. This is not, therefore, a situation where a remand is required so that the district court may consider the question first. *See Singleton* v. *Wulff*, 428 U. S. 106, 120-21 (1976); *cf. Molina-Crespo* v. *Califano*, No. 78-1123 (1st Cir. Sept. 22, 1978).

10. *See* discussion *supra* at 17.

arrangement constitutes, implicitly if not expressly, a violation of § 13(c). If so, we must then determine whether the Union has a private federal remedy for a statutory violation of that nature.

A.

Section 13(c) of the UMTA does not explicitly require compliance with the labor protective arrangements that it dictates must be made as a condition of financial assistance under the Act. We feel, however, that § 13(c) clearly implies a requirement that the protections upon which assistance is conditioned be honored.

The § 13(c) statutory scheme is more extensive than at first meets the eye. Section 13(c) commands, as a condition of receipt of federal financial assistance, that labor protective arrangements be made that are deemed fair and equitable by the Secretary of Labor. These arrangements are not only to be fair and equitable in some general sense, but "shall include" provisions necessary to carry out major substantive guarantees to transit workers that Congress lists in the statute, *e.g.*, preservation of rights under existing collective bargaining agreements, protection of individual employees against a worsening of their employment positions, and priority in reemployment. *See* notes 1, 5, *supra*. Moreover, § 13(c) directs that the terms and conditions of the approved labor protective arrangements be specified in the federal grant contract itself. The statute thus does more than prescribe the making of any kind of fair labor arrangements between a federal grantee and its employees. It confers far-reaching protections upon employees of grant recipients. It assures, in addition, that arrangements guaranteeing these protections will be made, approved by the highest federal labor official and embodied in the federal grant contract itself.

This statutory scheme leaves room for no conclusion but that Congress intended that grant recipients must comply with the arrangements. The statute would be utterly meaningless if the

arrangements were not observed. The object of the statute is to afford certain protections to transit workers; if it required only that the arrangements be made but not that they be respected, it would fail in this purpose, since no other machinery is provided for translating the protections into reality. Our conclusion accordingly is that § 13(c), implicitly though not expressly, commands compliance with the labor protective arrangements by the grant recipient. *Accord, Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, No. 77-1981, slip op. at 10 (7th Cir. Oct. 19, 1978). Noncompliance effectvely violates § 13(c).

Section 13(c)'s implied requirement of compliance it not limited, moreover, to just those arrangements that may be said to be comman led by the substantive provisions articulated in § 13(c). Thus here the absence of an express requirement for interest arbitration is not significant. The statutory emphasis is upon the securing of fair and equitable arrangements to protect the interests of employees, as determined by the Secretary of Labor, which arrangements shall include "without being limited to," certain specified provisions. Once the labor protective arrangements have been made, approved, and incorporated in the grant contract they have become the vehicles for carrying out Congress' purpose. We believe that Congress contemplated that a grant recipient would comply with all the terms and conditions of an approved protective arrangement upon which the grant was conditioned, regardless of whether or not other terms and arrangements would have been equally acceptable under § 13(c).

B.

Having concluded that § 13(c) contemplates that a grant receipient live up to the labor protective arrangements upon which its grant is conditioned, and that noncompliance therefore violates § 13(c), the next aspect of the inquiry is whether there is a private federal remedy available to the Union for

breach of such an arrangement. The UMTA does not explicitly provide such a remedy. As a result, the Union can prevail only if such a remedy is implicit in the Act.

The Union argues that we do not need to imply a private cause of action, because "the statutory command to make a contract expressly creates a private action—to enforce the contract—and enforcement of the contract directly, indirectly and automatically enforces the statute." Similarly, the court in *LaCrosse* stated:

> " 'Congress intended that the contracts embodying the 'fair and equitable arrangements' were to be enforceable contracts. It would be fatuous to suggest otherwise. Because the contracts were to be enforceable, it follows that they were to be enforced at the instance of the parties to the contracts.' "

No. 77-1981, slip op. at 17. This analysis is perhaps too simple Section 13(c) nowhere commands the making of a contract between a union and a grant recipient setting forth the terms of the labor protective arrangements. To be sure Congress contemplated that "specific conditions for worker protection will normally be the product of local bargaining and negotiation." H. R. Rep. No. 204, 88th Cong., 2d Sess., *reprinted in* [1964] U. S. Code Cong. & Ad. News 2569, 2584-85. But, Congress did not require that the labor protective arrangements be included in any contract other than the grant contract, to which the union is not a party. We feel that an implied congressional intention that contracts between unions and employers, which Congress neither required nor contemplated would be made in all cases, be federally enforceable is not a wholly adequate basis upon which to premise a union's right to enforce § 13(c) labor protective arrangements in federal court. We reach a similar result by a slightly different route. We think it proper to infer that § 13(c) implies a private federal cause of action for breach of the terms and conditions of the labor protective arrangements whether or not embodied in an actual contract between the employer and its employees.

We begin by recognizing that this case is somewhat different from those decided by the Supreme Court dealing with the implication of a remedy. In *Cort* v. *Ash*, 422 U. S. 66 (1975), and other cases of this genre, there typically has been a federal statute, criminal or civil, whose express substantive commands are alleged to have been violated; the plaintiff has professed to be of the class for whose benefit the statute was enacted; and the question has been whether be may bring a private action for the statutory breach in the absence of explicit authority being given to this class to bring private actions. Often in the picture, also, have been alternative express remedies, such as provision for agency enforcement without any provision for a private suit. *See, e.g., National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U. S. 453, 471 (1974); *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964). Here, however, only an implied statutory command—that the labor protective arrangements be complied with—is allegedly violated. The substantive right to interest arbitration asserted stems from the contract only, not the statute. In addition, there is no explicit private remedy.

But while this case does not neatly fit within the *Cort* paradigm, we believe that implication of a federal remedy is appropriate—for reasons that, in the end, are entirely consistent with the logic of *Cort* v. *Ash*. Section 13(c), as we have seen, in an extensive and federally-oriented statutory scheme. It commands, as a condition of UMTA assistance, the making of labor protective arangements whose content must meet minimal specified substantive requirements and have the approval of the Secretary of Labor. Section 13(c) commands in addition that the terms and conditions of the arrangements be specified in the federal grant contract. The protective arrangements thus give rise to federally-created rights, and we are mindful that "[i]t is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 457 (1957). To leave to the courts of fifty states

the enforcement of labor protective arrangements that were formed, approved by the Secretary of Labor, and specified in federal grant contracts in order to carry out federally-created rights would seem anomalous indeed. But what tips the scale further, and decisively we think, in favor of a federal remedy is that the federal financial assistance contract between the Secretary of Transportation and the grantee is enforceable in federal court in suits brought by the Secretary. 49 U. S. C. § 1608(a); 12 U. S. C. § 1749a(c)(3) & (4); 28 U. S. C. § 1345. Section 13(c)'s requirement that the terms and conditions of the labor arrangements be part of the grant contract therefore makes them enforceable in federal court in suits by the Secretary of Transportation. Congress clearly contemplated that the labor protective arrangements would be subject to federal court enforcement proceedings, at least in suits brought by the Secretary of Transportation. Moreover, such suits in federal court to enforce the terms of a grant contract would be governed by federal substantive contract law, not varying state law dependent upon venue. *Priebe & Sons* v. *United States*, 332 U. S. 407, 411 (1947); *United States* v. *Standard Rice Co.*, 323 U. S. 106, 111 (1944); *cf. Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943). By contrast, there is no countervailing indication that Congress meant to leave these matters to localized state court decision. A preference for federal jurisdiction is understandable given the inevitable interrelation between the negotiated labor protective arrangements and the federal statute dictating them; enforcement litigation will surely involve interpreting the protective arrangements in light of the purposes and policies of § 13(c), as well as resolving issues relating to the interplay between federal and state labor policies and possible supremacy clause problems.

As well as contemplating enforcement of the labor protective arrangements in federal court at the suit of the Secretary of Transportation, Congress also must have contemplated that protected transportation employees would be able to institute private enforcement actions. Employees covered by a § 13(c) agreement, or their union, could of course bring a contract action, in state if not federal court, to enforce the agreement. In addition, protected employees, whether covered by a § 13(c) agreement or not could likely enforce the protections as donee or intended beneficiaries of the assistance contract between the Secretary of Transportation and their employer. *See Euresti* v. *Stenner*, 458 F. 2d 1115, 1118-19 (10th Cir. 1972); *United States ex rel. Johnson* v. *Morley Construction Co.*, 98 F. 2d 781, 788-89 (2d Cir. 1938); Restatement of Contracts §§ 133, 135 (1932).[11] Lastly, it seems plausible, although we do not undertake to decide the question, that protected employees could successfully maintain a suit under the Administrative Procedure Act, 5 U. S. C. §§ 701-06, to compel the Secretary of Transportation to institute action in federal court to enforce the labor protective obligations of a recipient of UMTA funding. *See generally Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 410 (1971).

We do not rest on these consideration alone in implying a private federal remedy on the Union's behalf. The Supreme Court in *Cort* v. *Ash*, 422 U. S. at 78, identified four factors it regarded as key to the implication of a private remedy from a federal statute. These factors were described as follows:

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy

11. *See also McDaniel* v. *University of Chicago*, 548 F. 2d 689, 694 (7th Cir. 1977), *cert. denied*, 98 S. Ct. 765 (1978); *City of Inglewood* v. *City of Los Angeles*, 451 F. 2d 948, 954-56 (9th Cir. 1972); *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847 (5th Cir.), *cert. denied*, 388 U. S. 911 (1967).

Unless the presence of diversity jurisdiction made it clearly cognizable by a federal court, such a third-part action might be limited to a state court, although federal question jurisdiction would possibly be open. *See generally Miree* v. *DeKalb County*, 433 U. S. 25 (1977).

or to deny one? See, *e.g.*, *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e.g.*, *Amtrak*, *supra*; *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 423 (1975); *Calhoon* v. *Harvey*, 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963); cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 434 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 394-395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment)."

The first *Cort* factor is plainly met here. Transit workers affected by UMTA assistance are the especial beneficiaries of § 13(c), and Congress created a federal right in their favor by directing that the labor protective arrangements be made, implying that they be abided by, and requiring that their terms and conditions be specified in the federal grant contract.

The second *Cort* factor—indication of a legislative intent, explicit or implicit, to create a private federal remedy—is also met. To a major extent, § 13(c) relies upon privately-negotiated arrangements which, by their nature, invite private enforcement. And we think that Congress signalled an intention to authorize federal rather than merely state court enforcement when it directed that the labor protective arrangements be incorporated in the federal grant contracts. It would be anomalous if arrangements forming a part of the terms of that federally enforceable contract were enforceable by the protected employees only in state tribunals. In addition, since the Secretary of Transportation is not an official usually charged with protecting the rights of labor, we think Congress would reasonably have assumed that the persons for whose benefit the protective provisions were inserted—the transit workers and their unions—would themselves be permitted to enforce these rights in the forum in which

litigation concerning the terms of the federal grant would normally occur. The statute delegates no such enforcement authority to the Secretary of Labor—the logical federal official to enforce such rights if they were to be enforceable only by a public officer. And we are aware of no affirmative reason why Congress would think it disadvantageous for the intended beneficiaries of this legislaton to act in their own behalf, especially where the labor arrangements would likely be in the form of a contract to which they were a party. *Cf. National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U. S. 453.

Application of the third *Cort* factor turns on whether the "legislative scheme" against which to test the implied remedy is the entire UMTA or just § 13(c). If the former, the third factor is probably beyond us: a court cannot accurately say whether an implied remedy for labor will in these circumstances further or hinder the goals of mass transportation. If the legislative scheme is defined as § 13(c) alone, however, it would seem obvious, for reasons to which we have already partially alluded, that there are distinct benefits to the employees in having a private remedy in the federal courts. The Secretary of Transportation is unlikely to move as swiftly as the employees to sue for breach of the protective arrangements, and the state courts, or some of them, may be less concerned to interpret the arrangements in light of Congress' purposes in enacting § 13(c). The § 13(c) protective arrangements are not merely the product of private contracts, freely negotiated, but are vehicles for carrying forward the substantive labor policies set forth in the federal statute. If the arrangements are to serve their labor protective function,

> "their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if [an arrangement] contrary to the federal command were nevertheless enforced under state law or if [an arrangement] were struck down even though in furtherance of the federal scheme."

International Association of Machinists v. *Central Airlines, Inc.*, 372 U. S. at 691. Therefore, effective federal enforcement of the terms of the labor protective arrangements, in the form of private actions by protected transportation workers, would serve the purposes underlying § 13(c).

Finally, we think the fourth *Cort* factor points in favor of an implied federal remedy. The Union's precise cause of action, an action to enforce the labor protective arrangements created pursuant to § 13(c), could not exist without the UMTA. It was pursuant to the UMTA that the Union and the District entered into the § 13(c) agreements and the agreements' protective arrangements were incorporated into the assistance contracts between the District and the federal government. It therefore seems manifest that enforcement of the protective arrangements is not a function traditionally relegated to state law nor basically a concern of the states. Congress was concerned with enforcement, and contemplated at least some enforcement in federal courts.

It is true that if the Union's action were viewed narrowly as just an action to enforce the § 13(c) agreement, an argument could be made that it is one traditionally relegated to state law. The basis for the argument would be that collective bargaining agreements between a state agency and the representative of its employees traditionally are governed by state law and einforced in state courts. *See* 29 U. S. C. § 152(2), 185, 187. While § 13(c) agreements are not usual collective bargaining agreements specifying terms and conditions of employment, they are somewhat analogous. Section 13(c) agreements, however, differ from usual collective agreements entered into by state and local agencies in that their terms are regulated by federal law. The UMTA requires that § 13(c) agreements be made, and places important requirements on their content. Usual collective bargaining agreements covering state employees are subject only to state regulation. *See* 29 U. S. C. § 152(2); *cf. National League of Cities* v. *Usery*, 426 U. S. 833 (1976) (wages and

hours of state employees constitutionally excluded from federal regulation). Therefore, the traditional allocation to state courts of enforcement of state collective agreements is not a basis for holding that enforcement of arrangements pursuant to § 13(c) should also be left to state tribunals. Federal regulation makes enforcement of the labor protective arrangements the concern of the federal government, not "basically the concern of the States," rendering an implied federal remedy not inappropriate under *Cort's* fourth factor.

We therefore conclude that the Union does have a federal cause of action, implied from UMTA § 13(c), to enforce the labor protective arrangements to which the District agreed as a condition of federal financial assistance under the Act.[12] The Union's complaint thus states a claim upon which relief can be granted and over which the district court has subject matter jurisdiction. Of course, nothing herein is meant to indicate our views on the merits of the action.

Reversed and remanded for proceedings not inconsistent herewith.

12. Our conclusion that § 13(c) implicitly provides the Union with a cause of action reinforces our determination that the Union's claim arises under federal law for jurisdictional purposes. *Ivy Broadcasting Co.* v. *A. T. & T.*, 391 F. 2d 486, 489 (2d Cir. 1968); *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F. 2d 424, 426 (2d Cir. 1965), *cert. denied*, 382 U. S. 1026 (1966); *T. B. Harms Co.* v. *Eliscu*, 339 F. 2d 823, 826-28 (2d Cir. 1964); *cert. denied*, 381 U. S. 915 (1965); C. Wright, A. Miller, & E. Cooper, *supra*, § 3562 at 402-03.